Lebis Contracting, Inc. *and* **Local 449, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America.** Cases 3-CA-9723 and 3-RC-7779

9 August 1983

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS JENKINS AND ZIMMERMAN

On 28 September 1981 Administrative Law Judge Karl H. Buschmann issued the attached Decision in this proceeding. Thereafter, the Respondent filed exceptions and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and brief and has decided to affirm the rulings, findings,[1] and conclusions of the Administrative Law Judge and to adopt his recommended Order, as modified herein.

Based on his assessment of the credited testimony, the Administrative Law Judge found that the Respondent violated Section 8(a)(3) and (1) of the Act by discharging truckdrivers Lawrence London and Kenneth Waltz, Jr., because of their union activities. In so finding, the Administrative Law Judge rejected, as not worthy of belief, the Respondent's contention that, prior to being informed of their union activities, it discharged them for cause: London, for ineptitude and for behaving in an insolent manner toward his supervisor, and Waltz, because he was frequently late for work, slow, when working, and because he refused to accept supervision.[2]

It is undisputed that London and Waltz last worked for the Respondent on Tuesday, 25 March 1980; that on Wednesday morning, 26 March, the Respondent received a copy of the petition filed by the Union seeking to represent the Respondent's three drivers; that Anthony Bodami, Jr., the Respondent's president, immediately summoned to his office Bradley Vaughn, the only truckdriver still working, and there questioned him concerning his involvement with respect to the petition; and that Vaughn told Bodami he signed an authorization card as requested by London and Waltz, but that they had initiated the organizational effort.

However, the parties joined issue on the pivotal question concerning the employment status of London and Waltz on 25 March, after they ceased work at the Respondent's Eagle Street demolition project. Consistent with their testimony, the General Counsel asserts that London and Waltz were laid off for lack of work, as the project neared completion, until such time as work might become available on a Purina silo demolition job. The Respondent insists that, on the day in question, both employees were discharged separately by Anthony Bodami III, the president's son and project supervisor, for the reasons mentioned, albeit there were no witnesses to the conversations during which the discharges were alleged to have occurred.

In support of its contention, the Respondent relies substantially on the testimony of Vaughn who stated that, during his conversation with Bodami Jr. bout the petition, the latter informed him that London and Waltz had been discharged on the preceding day. The Respondent also relies on testimony to the effect that work continued apace on the Eagle Street project until the Thursday following the discharges; that other, smaller demolition jobs had not been completed elsewhere; and that, as Vaughn testified, demolition of the Purina silo began on the following Monday, well before London and Waltz claim they had learned of their discharges—thus compelling, it argues, the conclusion that sufficient work opportunities existed, at the time of the alleged layoff and throughout the entire period in question, for employees who were otherwise suitable.[3]

[1] The Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings. Neither do we find merit in the Respondent's contention that, because the Administrative Law Judge generally discredited the Respondent's witnesses and credited the General Counsel's witnesses, his credibility resolutions are erroneous or attended by bias or prejudice. *NLRB v. Pittsburgh Steamship Co.*, 337 U.S. 656 (1949). Indeed, upon careful examination of the Administrative Law Judge's Decision and the entire record in this proceeding, we are satisfied that the Respondent was accorded a full and fair hearing and that its allegations of bias and prejudice are without merit.

[2] Thus, the Administrative Law Judge found that the Respondent tolerated whatever poor work habits London and Waltz had exhibited until it became aware of their union activities (at which time it summarily discharged them). He noted, *inter alia*, that, although London had been employed only 9 months, Waltz had worked for the Respondent for 5 or 6 years, and that Waltz' tardiness had been a longstanding problem.

[3] Significantly, there is no suggestion on the record in this proceeding that either London or Waltz was ever replaced by another driver at a time here relevant. Indeed, Vaughn himself acknowledged, on cross-examination, that on the day after London and Waltz left the Eagle Street project "there was only enough work for one truck."

In these circumstances, and in view of the fact that the Respondent's total surviving work force was employed on the Eagle Street project, we fail to see what relevance there may be in the existence of smaller, unfinished demolition projects elsewhere without the equipment and labor necessary to load debris therefrom onto waiting trucks.

The Respondent also sought to buttress its case with the testimony of a number of witnesses, setting forth in substantial detail the deficiencies in the skills and work habits of the employees in question.

The Administrative Law Judge found that London and Waltz were in fact laid off on 25 March for want of work, as they had testified, and were subsequently discharged because of the representation petition which was filed on their behalf and as a result of their efforts.

The Respondent excepts, among other things, to the Administrative Law Judge's conclusion that Vaughn's testimony was weakened by affidavits casting doubt on his credibility. The Respondent asserts that inconsistencies found among three of Vaughn's affidavits relate merely to dates, and that the confusion with respect thereto was engendered by the Board's own agents, whose harassment of Vaughn is evidenced by the number of affidavits taken.

Our examination of these affidavits reveals discrepancies which involve more than mere confusion as to dates. In Vaughn's first affidavit, taken by a Board agent on 26 April 1980, he stated that Bodami Jr., when questioning him about the representation petition "did not tell me at that time that he was going to fire Kenny and Larry." Rather, late in the afternoon of the following day, when Bodami Jr. was at the Eagle Street project, "he informed me that he had discharged Larry and Kenny." In a second affidavit, taken 1 week later by the Respondent's counsel, Vaughn, again referring to the occasion on which he was questioned concerning the petition, stated: "I said Kenny and Larry had wanted to file a petition for the Union. Bodami said he had fired them yesterday morning. I knew he was going to do it so it wasn't a surprise to me." Thereafter, in a third affidavit, subscribed before a Board agent on 5 May, Vaughn repudiated the foregoing, and reasserted what he had said in the first. Such equivocation with respect to important events hardly lends support to Vaughn's credibility. Further, in his final affidavit, taken on the eve of the hearing, Vaughn, while asserting that discussions with the Respondent leading to his ultimate change in status from employee to independent contractor had begun well before events giving rise to this proceeding, stated that such change in status did not occur until 16 May 1980,

> . . . because Bodamie [sic] wanted to see if there was enough work to make this type of arrangement worthwhile. After Lebis got the demolition contract with Ralston Purina it was determined by both of us that the arrangement was worthwhile. About the end of April or the first part of May 1980 I was told by Bodamie, Jr, that Lebis got the Purina contract.

It is noteworthy, in this respect, that neither Bodami testified as to the date when work actually commenced on the Purina project, the Respondent apparently choosing to rely solely on Vaughn's testimony that such work began on the Monday following the discharges of London and Waltz.

Based on the foregoing, we conclude, as did the Administrative Law Judge, that there was work sufficient for only one truckdriver at the time London and Waltz ceased working at the Eagle Street project; that they were laid off by Bodami III, until such time as demolition of the Purina silo might begin, as they so testified; and that they were subsequently discharged by Bodami Jr. when the latter learned of their activities with respect to the petition. It is clear that, between the time London and Waltz were laid off and the time of their discharges, nothing intervened save notice on the part of the Respondent of the filing of the representation petition and their involvement with respect thereto. The conclusion is inescapable that they were discharged for these reasons and not because they were unsatisfactory employees. Such discharges are discriminatory, strike at the heart of employees' statutory rights, and constitute violations of Section 8(a)(3) and (1) of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, as modified below, and hereby orders that the Respondent, Lebis Contracting, Inc., Buffalo, New York, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, as so modified:

1. Insert the following as paragraphs 2(a) and (b) and reletter the subsequent paragraphs accordingly:

"(a) Offer to Lawrence London and Kenneth Waltz, Jr., immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges, and make them whole for any loss of earnings they may have suffered by reason of the discrimination against them, in the manner set forth in the section of this Decision entitled 'The Remedy.'

"(b) Expunge from its files any reference to the discharges of Lawrence London and Kenneth Waltz, Jr., and notify them in writing that this has been done and that evidence of their unlawful dis-

charges will not be used as a basis for future personnel actions against them."

2. Substitute the attached notice for that of the Administrative Law Judge.

IT IS FURTHER ORDERED that the challenges to the ballots cast by Lawrence London and Kenneth Waltz, Jr., in Case 3-RC-7779 be overruled, that their ballots be opened and counted, and that an appropriate certification be issued.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

WE WILL NOT discourage membership in Local 449, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, or any other labor organization, by discharging any of our employees or in any other manner discriminating against them in regard to their tenure of employment or any term or condition of employment.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of rights guaranteed them by Section 7 of the Act.

WE WILL offer Lawrence London and Kenneth Waltz, Jr., immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges, and make them whole for any loss of earnings, with interest, they may have suffered as a result of the discrimination against them.

WE WILL expunge from our files any reference to the discharges of Lawrence London and Kenneth Waltz, Jr., and notify them in writing that this has been done and that evidence of their unlawful discharges will not be used as a basis for future personnel actions against them.

LEBIS CONTRACTING, INC.

DECISION

STATEMENT OF THE CASE

KARL H. BUSCHMANN, Administrative Law Judge: This case arose upon the filing of charges by Local 449, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Local 449), in Case 3-CA-9723 and was consolidated with Case 3-RC-7779. The complaint, issued May 15, 1980, contained alleged violations of Section 8(a)(1) and (3) of the National Labor Relations Act (the Act). It is alleged that on or about April 3, 1980, Respondent discharged Lawrence London and Kenneth Waltz for engaging in protected concerted activities, offered to return Waltz to work if he would forget about the Union, and threatened to spend $100,00 to fight the Union. Respondent's answer, filed on May 20, 1981, denies all allegations set forth in the complaint.

FINDINGS OF FACT

The Respondent, Lebis Contracting, Inc., a New York corporation, maintains an office in Buffalo, New York, as its principal place of business and is engaged in demolition and hauling work in the construction industry. In 1979, Respondent had contracts with the city of Buffalo, New York, in excess of $50,000. The city of Buffalo annually purchases in excess of $50,000 in goods and materials from businesses located outside the State of New York. Respondent is an employer within the meaning of Section 2(2) of the Act and is engaged in commerce within the meaning of Section 2(6) and (7).

Lebis is a small family-run operation managed by Anthony Bodamie, Jr. His son, Anthony Bodamie III, is the supervisor for most of its demolition projects, including (the primary focus of this proceeding) the Eagle Street project which lasted roughly from January until the last week of March 1980. During that time Respondent employed Bradley Vaughan, Kenneth Waltz, and Lawrence London, three truckdrivers who hauled truckloads of debris from demolition sites to dump sites; Linda Gimbrone, a secretary; Glen Lee, the operator of a front-end loader; and Angello Sellan, a laborer and the son-in-law of Bodamie Jr.

In February 1980, the drivers became interested in joining a union and obtained authorization cards from Local 449, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America. By March 12, 1980, all three of Respondent's truckdrivers had signed union authorization cards. On March 24, Local 449 filed a petition with Region 3 for certification of representation for Respondent's truckdrivers and, on March 26, Respondent received notice thereof from the Regional Director. Prior to the receipt of the NLRB notice, Respondent was unaware of its drivers' plan to organize. Shortly after receipt of the NLRB notice, Bodamie Jr. had Vaughan report to his office whereupon he was questioned about the drivers' union organization effort and about his own role therein.

On the previous day, March 25, A. Bodamie III, the drivers' supervisor, informed Waltz and London, individually, at the Eagle Street site, and absent any third party observers, of a change in their employment status. The parties disagree as to whether they were laid off or fired at that point. The parties do agree, however, that after noon on March 25 neither Waltz nor London ever again worked for Respondent and that Vaughan, the driver with the least seniority at Lebis, did continue working for Respondent for at least the remainder of that day. The record discloses no clearly demonstrable change in Vaughan's employment status prior to May 16, the day Respondent received the NLRB complaint leading to

this proceeding. On May 16, Vaughan signed a contract with Respondent becoming Respondent's sole independent trucking contractor and acquiring, with no down payment, possession of one of Respondent's truck tractors. According to Vaughan's affidavit of October 28, 1980 (G.C. Exh. 8):

> The contracting arrangement is a lease purchase arrangement where I am responsible for the repairs, all maintenance, fuel, licensing fees, registration, fuel tax and state permit for one tractor. The tractor was owned by Lebis Contracting and they hold the mortgage on the tractor. The leasing fees include the payment of the mortgage. I am still covered under Lebis' workmen's compensation since there are circumstances where I work straight time.

Vaughan's change in status from employee to independent contractor led him to abstain from voting in the union representation election held at Lebis on June 6, 1980, because, as he put it, "since I was going into business for myself I did not need the union representation" (G.C. Exh. 8). Waltz and London did vote in that election, but the Board agent conducting the election challenged their ballots because their names did not appear on the eligibility list. Their names did not appear on the list because Respondent claimed they had been fired for cause on March 25.

The General Counsel contends that, on March 25, Bodamie III individually informed Waltz and London that hauling work had been completed at Eagle Street and that each was laid off, probably for a couple of weeks, until demolition operations at the anticipated Ralston Purina job required their return. The General Counsel further contends that Respondent did not decide to fire Waltz and London until after it had been surprised by the receipt of the NLRB union election notification on March 26, and only after Bodamie Jr. questioned Vaughan about his and the other drivers' intention to unionize. The General Counsel claims that the first news either driver received regarding their joint termination was not until April 3, when Bodamie Jr. told Waltz that his son had fired them both back on March 25. During this April 3 conversation between Waltz and Bodamie Jr., the latter allegedly offered Waltz his job back if he would forget about the Union and also threatened to spend $100,000 to keep the Union out. Waltz and London were the General Counsel's only witnesses.

Respondent contends that there was no significant lull in demolition operations between the Eagle Street and Purina jobs requiring any layoff. Respondent asserts that Bodamie III fired Waltz and London on March 25 because their sluggish work pace and consistent disobedience continued despite several warnings and finally became intolerable. Respondent called Bodamie Sr., Bodamie Jr., Bodamie III, Vaughan, Gimbrone, Lee, and Sellan as witnesses.

The record shows that London and Waltz had worked for Lebis up until March 25, 1980, when they were laid off because the "Eagle Street job" was nearly finished. On the following day, Respondent received written notice in the form of a petition for certification of representation that its employees were interested in belonging to a union. Bodamie Jr. promptly questioned Brad Vaughan about this document and his involvement with the Union. Vaughan told his employer that London and Waltz had been instrumental in getting the Union involved and that they had signed union cards. Vaughan reluctantly admitted to signing a card because he had to support his "own faction."

London and Waltz did not know until substantially later that they had been discharged; Waltz was informed on April 3 when he picked up his paycheck that he had been fired by Bodamie III, because he took too many coffeebreaks and drove too slow; London officially found out on April 15 from Respondent's testimony at the representation hearing that he had been discharged. In view of the timing of this sequence of events, the inference is clear that Respondent had converted the employment status of the drivers from a layoff to a discharge because of the employees' union activity.

The record also contains the testimony of Waltz concerning a conversation which he had with Bodamie Jr. on April 3, where Bodamie allegedly told Waltz to forget about the Union, that he would spend a hundred thousand dollars to keep the Union out, and that he would like for Waltz to come back to work. There is no corroborating evidence to support this testimony. Bodamie Jr. admitted that he had a conversation with Waltz on that day, but he denied any conversation dealing with the Union.

I have not credited Waltz' testimony in this regard because I am not convinced of the accuracy of his testimony in all respects. For example, both Waltz and London denied having received any reprimands from management about their conduct on the job. I find it hard to believe that no one in management ever reprimanded Waltz for his tardiness or for transporting young passengers in the company's truck, nor do I find it credible that management accepted without criticism London's involvement in overturning the truck. I accordingly find that Respondent did not interfere with the rights of employees protected by Section 7 of the Act as alleged in the complaint.

In an effort to show that Waltz and London were discharged for cause, Respondent called several witnesses all of whom described in a corroborating fashion the shortcomings of the two employees. For example, Glen Lee, an operator of a front loader, testified that he considered London "a real bad truck driver" who had overturned a truck several months prior to his discharge and who was slow in backing up his truck to the front loader. Lee also criticized London because he frequently returned from the dump together with Waltz, instead of staggering their return with the trucks, and because he would wear radio earphones, making it difficult for the operator of the loading equipment to give signals by "goosing" the engine. The additional problem with London, according to Lee, was his practice of unloading the truck while standing outside of the cab, instead of operating the lever from the inside of the truck which is much safer in the event the truck should turn over.

Lee testified that Waltz was a good worker, but that he was habitually late for work. Lee further stated that Waltz would often have unauthorized passengers in his truck, and that he frequently picked up steel scraps for his personal profit on company time.

Brad Vaughan, the only other truckdriver for Respondent, was also critical of London and Waltz. He testified that he regarded London's ability as a truckdriver simply as that of "a beginner." He also referred to London's habits of wearing a radio headset and of unloading the truck while standing outside of his truck. Vaughan recalled that London had turned over the truck sometime in January and that he appeared to have become more cautious after that accident. Vaughan believed that Waltz was late for work as often as 3 days a week. He stated that Waltz frequently transported kids in his truck, and that he often picked up steel scrap on company time.

Linda Gimbrone, a former secretary for Respondent, corroborated Waltz' habitual lateness for work. She testified that she frequently had to telephone Waltz at his home to remind him to come to work.

Sellan, a laborer and son-in-law of Bodamie Jr., testified that London continued to dump his truck from outside the cab in spite of Bodamie's complaints about the practice. Sellan observed that London became more "scared" and "nervous" after the experience with the overturned truck. In his testimony, Sellan also referred to London's practice of wearing earphones while operating the truck and Waltz' practice of transporting kids in his truck.

Bodamie Jr., Respondent's general manager, referred in his testimony to some of the undesirable work habits of the two truckdrivers and generally described them as slow and uncooperative. According to Bodamie Jr., transporting unauthorized passengers created problems with the insurance coverage on the trucks, the wearing of earphones was unsafe and might cause accidents, and picking up steel scrap interfered with the employees' working time. When asked specifically in what manner their performance on the job was poor, Bodamie Jr. answered as follows:

> In all types of manners. They were very belligerent about anything. They didn't care about anything. They were breaking the truck. My mechanic was in a run every minute of the day to fix the trucks for one thing or another. They were breaking the air lines, the signals never worked; the horn never worked, nothing was working.

In his opinion, their unsatisfactory work habits began approximately 3 months before they were fired. Significantly, Bodamie Jr. stated as follows in answer to the General Counsel's question what caused them to be fired on April 25:

> I don't know. My son was on the jobsite and he fired them. He just called me on the radio and said he was going to fire them.

Although Bodamie III had "[a]bsolute authority to anything he wants on the jobsite," according to his father, this authority did not include the authority to hire. Indeed, on prior occasions when Bodamie III had wanted to fire them, Bodamie Jr. had "told him not to fire them, to give them a little more ample time; maybe they would change."

Respondent's final witness was Bodamie III. He described London and Waltz as uncooperative and lazy, who would refuse to make minor repairs to their trucks and who would frequently run out of fuel because of lack of attention to their job. Waltz was often late for work and both would return from the dump "bunched up." Bodamie III testified that he frequently admonished the drivers about their poor work habits and that, on April 25, he fired them, under the following circumstances:

> Well, Mr. London didn't—I don't think he liked the idea that I was cracking down on him. And Kenny, I don't think that he liked to take orders from me, maybe because my age was too close to his. Anyway, he got cocky with me on the 25th. Maybe a week before he was fired he said that he could hear with those earphones. And I said, "If I see any problem with those earphones, that you don't hear something"; I said, "You are going to take them off." Well, anyways, on the 25th I was talking to the guy or he was in his truck and I told him to wait a minute. Now, earlier in the day I told him, as I always tell them, that they are supposed to only take two coffee breaks; one at 10:00 o'clock and one at 2:00 o'clock; that's what you are supposed to take. And I told Larry, the day before, on the 24th. He told me that he would keep a log. Okay. I says, "Fine. If you want to keep a log, keep a log and show it to me and I will match it up and give you the hours, so long as I see everything is straight." Anyways, the next day I asked him; I said, "Let me see your log. I want to see your log." This was the 25th and he had earphones on and he said, "I can't hear you, anyways. I don't have to keep a damned log. I don't have to listen to you. Damn it, I am sick of this."
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> And I waited for him to come back and I fired him.

Bodamie III then radioed his father to inform him that he had fired London, and that he would fire Waltz because "Kenny didn't change."

The foregoing summary of Respondent's justification[1] for the discharges of the two truckdrivers does not provide a plausible and convincing version of why two of the three truckdrivers were suddenly discharged at precisely the time of their bid to join the Union. London had been employed by Lebis for only 9 months, but

[1] Some of the testimony, particularly those portions critical of London's and Waltz' poor work habits, was elicited by leading questions. I have credited this testimony only to the extent where it was specific and corroborated. However, I have not credited generalities, such as Lee's statement that London was a "real bad driver" or young Bodamie's statement that Waltz was "the laziest" and the other Bodamie's reference to both as uncooperative or belligerent.

Waltz was a longtime employee for 5 or 6 years. The record does not show a culmination of poor work habits by either employee. Some of the objectionable conduct such as picking up steel was expressly permitted by the elder Bodamie and certainly tolerated by Bodamie Jr., as long as it did not interfere with his work. The accident with the truck happened several months prior to the discharge, Waltz' tardiness had been a longstanding problem and his transporting of other passengers happened several years prior to the discharge.

Also unconvincing was the sequence of events leading up to London's discharge, as described by Bodamie III. Certainly the dispute he had with London would hardly provide a basis for the discharge of Waltz. Moreover, even though Bodamie III supposedly had full authority to fire employees, he had never exercised that authority with other employees and would certainly not have done so without consulting with his father first.

Suspect is also Vaughan's change in status from a truckdriver to that of an independent contractor effective May 16. Indeed, when confronted by Bodamie Jr., Vaughan skillfully extricated himself from his union allegiance and explained away his signing of a union card. The obvious inference is that he was "taken care of" by his employer.

This also accounts for Vaughan's several and sometimes inconsistent affidavits. Of crucial significance is a resolution of whether the two men were discharged on March 25, as claimed by Respondent, or on March 26 after Respondent's receipt of the petition for certification of the Union. In this regard, the record contains the testimony of Vaughan describing a conversation which he had with Bodamie Jr. after the receipt of the petition. While Vaughan was moving a piece of equipment from the "Eagle Street job" to the "Ralston Purina plant," he was called by radio into Respondent's offices. Bodamie Jr. showed him the letter from the NLRB and asked what it was all about. Vaughan admitted that he had signed a union card and also informed Bodamie that Waltz and London had signed cards, and that they wanted to be represented by a union and work under a union contract.

His testimony, however, denied the significant statement in his affidavit of April 26, 1980, in which he stated that London and Waltz had been fired on the day *after* his conversation with Bodamie Jr. Subsequent affidavits, as well as his testimony, changed the sequence of events to the effect that the two drivers had been fired prior to the conversation with Bodamie and prior to his receipt of the petition. This inconsistency in his testimony and the various affidavits can only be explained by Vaughan's belated attempt to extricate his employer from union involvement.

Considering the record as a whole, the only logical inference to be drawn is that Waltz and London were laid off on March 25, because the Eagle Street job was basically finished, leaving Vaughan with the task of moving the machinery and other equipment to the next site, the Ralston Purina plant. When Respondent received the union petition, he questioned Vaughan about the matter and decided to fire the two other drivers thereafter.

CONCLUSIONS OF LAW

1. The Respondent, Lebis Contracting, Inc., is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union, Local 449, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent, by discharging Kenneth Waltz and Larry London, discriminated against its employees because of their union activities in violation of Section 8(a)(3) and (1) of the Act.

4. The challenges in Case 3-RC-7779 on the ground that Larry London and Kenneth Waltz were no longer employees of Respondent are overruled, as the record shows that they were temporarily laid off and unlawfully discharged. Their votes must therefore be counted.

5. Any other allegations in the complaint have not been substantiated.

THE REMEDY

In order to remedy labor practices found herein, my recommended Order will require Respondent to cease and desist from further violations, to post an appropriate notice to employees, and to offer unconditional reinstatement to Kenneth Waltz and Larry London and make them whole for all wages lost by them as a result of the unlawful discharges, such backpay and interest thereon to be computed in the manner prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), and *Florida Steel Corp.*, 231 NLRB 651 (1977).[2] I shall further order that the challenges to the ballots of Larry London and Kenneth Waltz be overruled.

Upon the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER[3]

The Respondent, Lebis Contracting, Inc., Buffalo, New York, its agents, officers, successors, and assigns, shall:

1. Cease and desist from:

(a) Discouraging membership in the Union, or any other labor organization, by discharging employees or otherwise discriminating in any manner in respect to their tenure of employment or any term or condition of employment.

(b) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action designed to effectuate the purpose of the Act:

(a) Offer to Larry London and Kenneth Waltz immediate and full reinstatement to their former jobs or, if

[2] See, generally, *Isis Plumbing Co.*, 138 NLRB 716 (1962).

[3] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

these jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges, and make them whole for any loss of earnings they may have suffered by reason of the discrimination against them, in the manner set forth in the section of this Decision entitled "The Remedy."

(b) Preserve and, upon reasonable request, make available to the Board and its agents, for examination and copying, all payroll records and reports and all other records required to ascertain the amount, if any, of any backpay due under the terms of this recommended Order.

(c) Post at its Buffalo, New York, offices and facilities copies of the attached notice marked "Appendix."[4] Copies of said notice, on forms provided by the Regional Director for Region 3, after being signed by Respondent's authorized agent, shall be posted by it immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that said notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director for Region 3, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply with this Order.

IT IS FURTHER ORDERED that the challenges to the ballots of Larry London and Kenneth Waltz be overruled.

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[4] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."